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HAROLD B. WIL

IN THE
Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

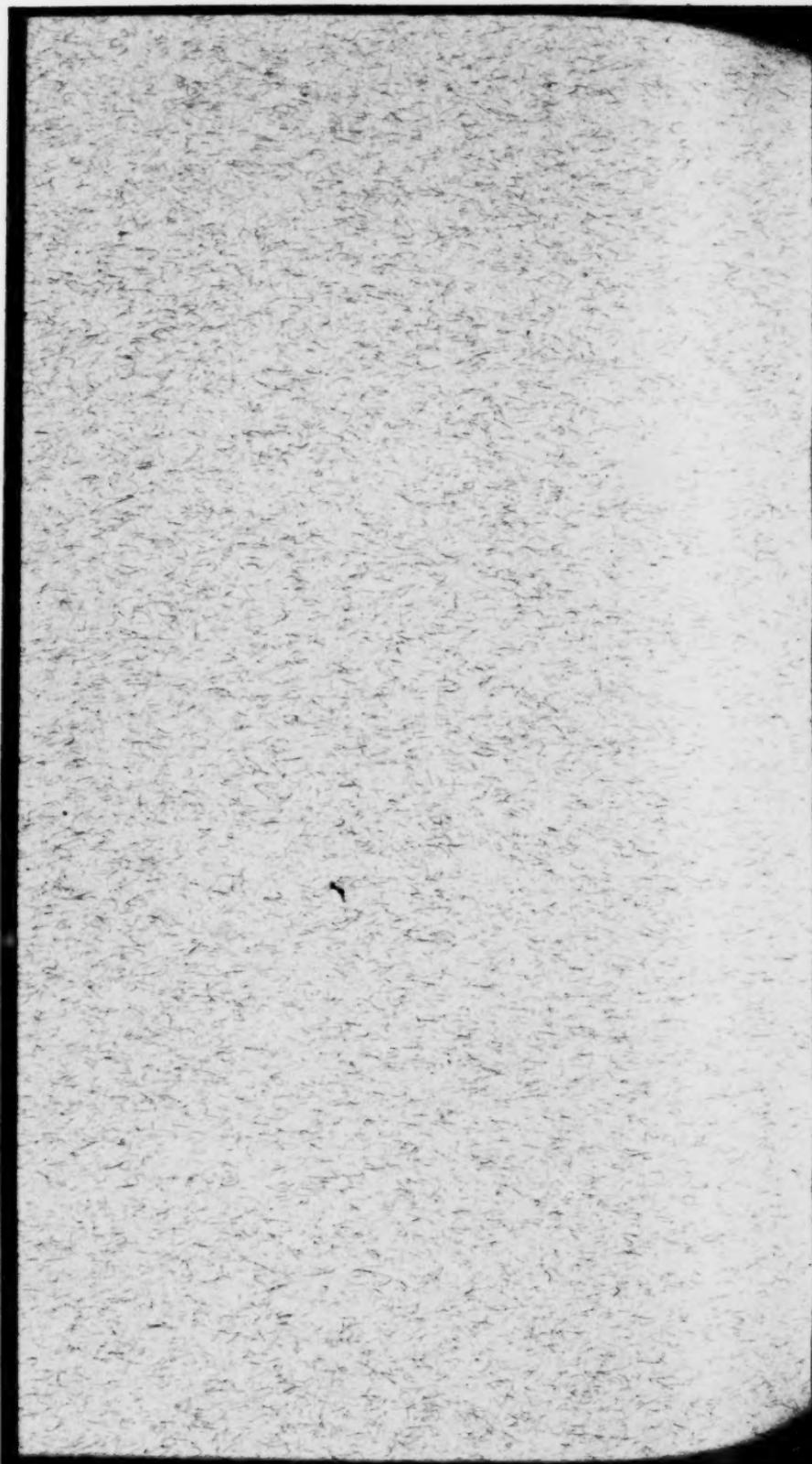
VS.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

**BRIEF IN OPPOSITION TO APPELLEE'S MOTION
TO DISMISS OR AFFIRM**

JAMES PIPER,
WILLIAM L. MARBURY,
WILLIAM POOLE,
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Counsel for Appellant.



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With its statement in opposition to appellant's Statement as to Jurisdiction, appellee has filed a motion to dismiss or affirm. Pursuant to Rule 7, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellant files this brief in opposition to appellee's motion. In doing so, appellant will confine itself to points not covered in its Statement as to Jurisdiction.

I.

STATEMENT OF ISSUES ON APPEAL

(1) Appellee contends that the only issue in the case is as to the power of the State of Maryland to impose on appellant "the duty of collection of its use tax". This confuses the real issue. The statute, the validity of which was drawn in question in the proceedings below, specifically provides that the vendor shall (in addition to all other penalties) be personally liable to the State for the use tax on all property sold by the vendor which is used in the State of Maryland, *whether the tax has been collected or not*. (Annotated Code of Maryland, Art. 81, Sec. 375, quoted in full in Appendix B of appellant's Statement as to Jurisdiction (R. pp. 105-106)). Moreover, the statute requires the vendor at the time of filing its return, to "pay to the Comptroller the taxes imposed by Section 369 of this sub-title" (Annotated Code of Maryland, Art. 81, Sec. 383, quoted in full in Appendix B of appellant's Statement as to Jurisdiction (R. p. 107)). As we have pointed out in our Statement as to Jurisdiction, the original complaint in this case shows that it is a suit to collect a tax from appellant, not merely a proceeding to enforce a duty of collection.

(2) In stating the issues appellee refers to appellant as having its "principal place of business" in Wilmington, Delaware. The record is clear that appellant has no other place of business.

(3) In listing appellant's contacts with the State of Maryland, appellee refers to "radio broadcast to Maryland residents". The record is clear that appellant has engaged in no broadcasting anywhere in the State of Maryland nor has it ever addressed any broadcast to residents of Maryland. True, appellant has used broadcasting facilities of a

station located in Wilmington, Delaware. No doubt the electronic impulses may occasionally have crossed over into Maryland although the record is silent as to this. In any event it would hardly seem appropriate to describe this activity of appellant as a "contact" with the State of Maryland. Perhaps for this reason radio broadcasting was not even mentioned in the opinion of the Court of Appeals.

II.

THE COMMERCE CLAUSE

Appellee argues that since the impact on interstate commerce of the Maryland Use Tax is identical whether the tax is collected from a non-resident vendor or from a Maryland purchaser, it should make no difference that the vendor is completely unconnected with the State of Maryland. This is the familiar argument by which taxing authorities have repeatedly attempted to sustain other direct levies on interstate commerce. This Court has always emphatically rejected these arguments. Recent illustrations may be found in cases of *McLeod v. Dilworth*, 322 U. S. 327 (1944); *Freeman v. Hewit*, 329 U. S. 249 (1946); *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951); and *Memphis Steam Laundry v. Stone*, 342 U. S. 389 (1952).

Appellee also argues that since appellant is entitled by the statute (Annotated Code of Maryland, Art. 81, Sec. 384) to withhold 3% of the tax to cover the expense of collection and remittance, the case is governed by the decision of this Court in *Colorado National Bank of Denver v. Bedford*, 310 U. S. 41 (1940). That case added nothing to the law established in *First National Bank v. Kentucky*, 9 Wall. 353 (1870). Both cases involved statutes which made national banks liable for taxes owed by somebody else; in the *Bedford* case, by the holders of safe deposit boxes, in the

Kentucky case, by holders of the company's capital stock. To the argument advanced in the *Kentucky* case that such an imposition on a national bank fell afoul of the doctrine of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), Mr. Justice MILLER replied as follows (p. 362):

“* * * The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal Government authorizes the tax.”

Nothing in the bank cases can have any bearing on the questions presented by the present appeal. Appellant's objection to paying the Maryland Use Tax is not based on its onerous effect but on its invalidity as a direct tax on interstate commerce. In such case, the amount of the tax is immaterial. *Spector Motor Service v. O'Connor, supra*. "Of course, a State tax on interstate commerce does not become a valid one merely because 'it's only a little one' ". Per FRANKFURTER, J., in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80 (1948) at p. 104.

III.

THE DUE PROCESS CLAUSE

Appellee apparently admits that it would be stretching the doctrine of the decided cases to hold appellant liable on all sales made to Maryland residents for use in that State. To attach so heavy a burden to such tenuous "contacts" as this record shows appellant to have with the State of Maryland is more than even appellee seems prepared to justify. For this reason appellee seeks to go outside the record so as to bring before this Court the supposed fact that the taxes for which appellant has been sued in this case arise entirely out of transactions where use in Maryland was in contemplation at the time of the sale.

Even if the record gave support to this supposition (which it does not), it would still be true that in no case has this Court sustained a tax under such circumstances. As appellant's Statement as to Jurisdiction clearly shows, this Court has never upheld imposition of a use tax on a vendor unless the vendor was engaged in substantial local activity related to the taxed transaction. Here no such relationship is shown. Cf. *Norton Co. v. Department of Revenue*, 340 U. S. 534 (1951). Granted that taxes, the ultimate incidence

of which falls on the purchaser, may be sustained on lesser contacts than those needed to uphold occupation taxes which fall directly on the vendor, neither sales nor use taxes can be upheld unless some substantial contact exists. *McLeod v. Dilworth*, 322 U. S. 327 (1944) makes this plain.

CONCLUSION

The questions presented are novel and important. Their decision is anxiously awaited by merchants and taxing authorities throughout the country. See *American Bar Association Journal* for June, 1953, Vol. 39, p. 449.

Respectfully submitted,

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July 2, 1953

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